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IN THE

Supreme Court of the United States

MARVIN D. HORNE, *ET AL.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DKT LIBERTY PROJECT AND EIGHTEEN INDEPENDENT RAISIN GROWERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Thomas Jefferson warned that "[t]he natural progress of things is for liberty to yield, and government to gain ground." Letter from Thomas Jefferson to Edward Carrington (May 27, 1788). Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulations of all kinds, particularly those that unduly interfere with the property rights of private individuals. The DKT Liberty Project has participated as *amicus* in this Court several times in the past, including in cases raising government takings issues, such as *Kelo v. City of New London*, 545 U.S. 469 (2005).

Joining The DKT Liberty Project as *amici* are eighteen independent California raisin growers[2] ("the Growers") whose crops are subject to the Raisin Marketing Order at issue in this case. The Growers produce raisins on small vineyards ranging from 18

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[1] Pursuant to Rule 37.2(a), *amici* confirm that all parties have consented to the filing of this brief. Petitioners' and Respondent's letters of consent to the filing of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6, *amici* further affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission.

[2] The Growers are identified individually in Appendix A to this brief ("App. A").

to 240 acres, which they have tended for an average of nearly 40 years. Many of the Growers carry on a multi-generational tradition of raisin growing in their families; indeed, some are third- or fourth-generation growers, and others continue family businesses dating back nearly 100 years. *See generally* App. A.

The Growers expend considerable resources in cultivating and harvesting their raisin crops each year. Only after they have expended these resources and harvested their crops do the Growers receive notice of the "reserve tonnage" of raisins their handlers will be compelled to segregate and then turn over to the Raisin Administrative Committee ("RAC")—an arm of the United States Department of Agriculture—to comply with the requirements of the Raisin Marketing Order that are at issue in this case. This "reserve tonnage" requirement is established by the RAC on an annual basis and requires the Growers to essentially give away a part of their raisin crop to the federal government each year. The Growers often forego not only the profits they would otherwise earn from the sale of those "reserve tonnage" raisins, but also their costs of production. Consequently, many of the Growers have resorted to taking second jobs or even to selling off acreage as a means of financing continued raisin production on what remains of their vineyards. *See* App. A at 1a, 3a–4a. The Growers thus have significant personal and economic interests in the Court's resolution of this case.

SUMMARY OF ARGUMENT

The Raisin Marketing Order[3] effectuates a direct, physical taking of a percentage of the Growers' raisin crops every year. *See* 7 C.F.R. §§ 989.65–66. The Fifth Amendment requires that the Growers receive just compensation for this taking, and the Ninth Circuit panel erred in concluding otherwise. The panel did so based on a fundamental misunderstanding of Petitioners' and the Growers' enterprises and a corresponding mischaracterization of the challenged reserve requirement as a mere condition on one particular "use" of their raisin crops. The panel further relied on a distinction between real and personal property that lacks foundation in the relevant case law, and one that proves particularly illusory in this context.

Unsurprisingly, the panel's erroneous reasoning on both grounds conflicts with this Court's and other courts' precedents. This Court should grant the petition to resolve these conflicts and to clarify that personal property enjoys the same Fifth Amendment protections as real property and that the government cannot condition entry into the stream of commerce on giving up the right to just compensation. More importantly, however, the Court should grant the petition to remedy a longstanding constitutional violation that not only results in a significant

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[3] *Handling of Raisins Produced from Raisin Variety Grapes Grown in California*, 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989) ("Raisin Marketing Order" or "Order").

hardship to California raisin growers, but also threatens to infect the regulatory schemes governing many other industries as well.

ARGUMENT

I. The Growers Cultivate A Specialized, Resource-Intensive Crop As Part Of A Long Tradition Of Raisin Growing In California, And They Suffer A Substantial And Disproportionate Burden Under The Raisin Marketing Order.

The Raisin Marketing Order mandates a direct, physical taking of the Growers' raisin crops with no guarantee of compensation, let alone just compensation. Small, independent growers shoulder a disproportionate share of this substantial burden. Raisin handlers—corporations that buy the raisins from growers and pack and prepare the raisins for sale—receive compensation for the work required of them under the Order, while growers do not. Yet the Ninth Circuit panel insisted that raisin growers voluntarily assumed that burden, depicting raisin growing as a discrete "choice" that Petitioners and, by extension, *amici* Growers may lightly abandon in favor of alternative crops should they wish to escape the effects of the Order. As the panel blithely asserted, raisin growers could "avoid the reserve requirement of the Marketing Order by planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *See* Pet. App. at 26a. For the Growers, however, that "choice" is really a livelihood requiring skill and long-term

commitment—a livelihood that once supported their families but, under the Raisin Marketing Order, often no longer can. Whatever kind of "choice" that may be, it is not one the Growers should be coerced into making by being forced to forgo just compensation for the taking of their property.

A. The Raisin Marketing Order Imposes A Significant And Disproportionate Burden With Little To No Benefit On Independent Growers.

As other courts and Petitioners have explained, the Raisin Marketing Order subjects raisin growers to a unique and "draconian" requirement that results in direct financial losses to their operations. *Evans v. United States*, 74 Fed. Cl. 554, 555 (2006), *aff'd*, 250 F. App'x 321 (Fed. Cir. 2007); *see* Pet. 4–7.

The raisin-growing cycle is such that raisin growers normally harvest their raisins in late August or September. The raisins are then delivered to raisin "handlers" in October and November who pack the raisins and prepare them for sale. In the first week of October of every year, the RAC establishes the preliminary "free tonnage" percentage that will apply to all raisin growers. *See Evans*, 74 Fed. Cl. at 557. This is the percentage of raisins for which the handlers actually pay raisin growers. The RAC establishes the "free tonnage" percentage based on its assessment of the quantity of raisins it believes the industry can sell worldwide. The remainder of the raisins are set aside as "reserve tonnage." Title to these raisins passes from the raisin growers to the RAC, and the handlers must physically segregate these raisins and hold them "for

the account" of the federal government ("reserve raisins"). 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4); *see Evans*, 74 Fed. Cl. at 557.[4] Handlers thus pay raisin growers only for the "free tonnage" of raisins they receive.

The RAC may then direct the reserve raisins held by the handlers wherever it sees fit. For example, the RAC may instruct that they be sold or sent as gifts to U.S. agencies, foreign governments, or charitable organizations, *id.* §§ 989.67(b)(2)–(4), or that they be disposed of in non-competitive secondary markets such as school lunch programs, *see id.* § 989.67. Alternatively, the RAC may sell reserve-tonnage raisins to handlers for resale in export markets. *See id.* §§ 989.67(c)–(e).

While raisin handlers receive compensation for segregating and storing the reserve tonnage each year, *see* 7 C.F.R. § 989.66(f), as well as export subsidies in certain cases, raisin growers receive no guaranteed level of compensation for the reserve raisins. Proceeds from the sale of the reserve raisins must first go to fund the RAC's own administrative

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[4] In computing the annual reserve tonnage, the RAC employs a method that "arbitrarily reduces the prior year's shipments by 10 percent." Raisin Production Manual 11 (L. Peter Christensen ed., University of California Agriculture & Natural Resources Communication Services (2000)). The RAC then offers the additional stock to handlers to enable them to maintain the same shipment volume as the previous year and to allow for market growth. "Any unsold tonnage from these offers remains in the reserve pool," *id.*, and therefore provides no separate basis for compensation to raisin growers.

costs. It is only after these costs have been paid that raisin growers receive any remaining proceeds, on a pro rata basis. *See* 7 C.F.R. § 608c(6)(E); 7 C.F.R. § 989.53(a), 989.66(h). In years for which there are no remaining proceeds, raisin growers receive no compensation at all for the reserve raisins.

Raisin growers must make substantial initial outlays and assume significant weather- and harvest-related risks well before early October when they first receive preliminary notice of the likely reserve tonnage requirement for the year's crops, *see* 7 C.F.R. § 989.54(b) (requiring announcement of preliminary free and reserve percentages by October 5 of each crop year, with a limited exception), and long before February 15 when they receive final notice of the year's reserve tonnage requirement, *see id.* § 989.54(d). In return, growers receive only an "equity interest" in the reserve raisins, which garners a return only after the RAC covers its own administrative costs and disburses any export subsidies to particular handlers from the net proceeds of the reserve tonnage. *See id.* § 989.66(h). In many years, this return fails to cover even the cost of production for the reserve tonnage. In some years, it is zero. *See* Pet. App. at 179a (reporting 47 percent reserve tonnage for crop year 2002–2003, which was sold at $970 per ton, but for which growers received no return). Therefore, although the Raisin Marketing Order technically applies only to handlers, *see* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), its negative impact is suffered almost exclusively by growers.

As a result of the Raisin Marketing Order, certain of the Growers who are *amici* here have been forced to sell vast swaths of their vineyards. Indeed, some have lost hundreds of acres of land. *See* App. A at 1a, 4a, 8a; James Bovard, *Why the California Raisins Have Stopped Singing*, The Wall Street Journal, May 26, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052723044797045795798310389 06554 ("Many California farmers have shifted their land to other crops; the acreage devoted to raisin production has plunged since 2000."). These losses are attributable in part to the difficulties many of the Growers report in obtaining bank loans necessary to fund the cultivation of the next year's crops. *See* App. A at 1a, 4a. As one Grower explains, the reserve requirement "creates a complex system," and, consequently, "the banks don't like to work" with them. *Id.* at 5a.

To compensate for the loss of income resulting from the Raisin Marketing Order, most of the Growers have sought additional sources of income. Fifty years ago, one Grower recalls, "the farm raised the family." *Id.* at 4a. Now, however, many of the Growers rely on second jobs to cover some of the upfront expenses of cultivation and harvesting and, at bottom, to enable them to keep their land and their homes. *See id.* at 1a, 3a–4a. The Raisin Marketing Order "drastically lowers farm [and] family income," *id.* at 6a, makes it "[d]ifficult to make ends meet," *id.* at 5a, and denies the Growers the opportunity "to plan a future to improve [their] quality of life," *id.* at 4a. The Raisin Marketing Order thus imposes a significant burden on *amici*

Growers, and indeed on all raisin growers, depleting their resources and threatening their ability to continue their treasured family businesses.

B. The Growers' Small, Independent Operations Reflect Deep Personal Commitments In Addition To Substantial Financial Commitments.

The Ninth Circuit's insistence that raisin growers can avoid the draconian burdens of the Marketing Order simply by "planting different crops," or "selling their grapes without drying them into raisins," Pet. App. at 26a, reflects a fundamental misunderstanding of the nature of Petitioners' and the Growers' raisin-growing enterprises. "A raisin vineyard is a long-term investment," as a "new vineyard usually takes 3 years before it will bear a commercial crop." Raisin Production Manual at 64. The Growers have invested considerable amounts of time, money, and effort in their vineyards. For many Growers, their vineyards represent a much deeper personal investment as well. Passed down over generations, the vineyards themselves and the skills the Growers developed while tending them comprise a livelihood that the Growers should not have to abandon in order to avoid uncompensated takings of the literal fruits of their labors by the United States.

Overall, the U.S. raisin industry consists of some 3,000 growers located within the central San Joaquin Valley near Fresno, California. *See* California Raisins, The California Raisin Industry, http://calraisins.org/about/the-raisin-industry/ (last visited Oct. 2, 2014). These growers cultivate

approximately 200,000 acres and produce a total of approximately 350,000 tons of raisins in total each year, *see id.*, which amounts to almost 100 percent of the raisins produced in the United States and about 40 percent of raisins produced globally, *see* William L. Peacock & Frederick H. Swanson, *The Future of California Raisins Is Drying on the Vine*, Cal. Agric., Vol. 59, No. 2, at 70 (Apr.-June 2005), *available at* http://ucanr.edu/datastoreFiles/391-325.pdf. Over 90 percent of these raisins are of the "Thompson Seedless" variety, *see id.*, a variety subject to the Raisin Marketing Order, *see* 7 C.F.R. § 989.166.

The Growers' vineyards range from 18 to 240 acres. Notwithstanding this relatively small scale, however, the Growers bring significant skill and experience to their operations. On average, the eighteen Growers who are *amici* here have spent nearly 40 years each in the industry, and some more than 60. Moreover, most carry on raisin-growing businesses from prior generations. One is a third-generation raisin grower; two others are fourth-generation raisin growers; and yet another continues a family business of nearly 100 years. *See* App. A at 3a; *see also* Raisin Production Manual at 7 ("Originally, most raisin farms were family operations consisting of 20 to 40 acres . . . These origins are reflected in the industry today, with many family-oriented, relatively small farms still in existence.").

The length of time the Growers and their families have been engaged in the raisin growing business reflects both the substantial outlays required to

establish a vineyard and the intensive nature of the cultivation and harvesting of its raisins. A vineyard is a "long-term investment" because it typically takes at least three years before a vineyard will produce a commercial crop. Raisin Production Manual at 64. Even after the initial planting, raisin vineyards require careful management on an ongoing basis. Each year the Growers spend, on conservative estimates, an average of over $3,100 per acre to cultivate the grapes for their raisin crops. *See generally* App. A.[5] Their determinations of how much to invest in the cultivation of a given year's raisin crop entails experience-informed consideration of weather- and harvest-related risks. By necessity, such investment decisions must be made well before the Growers are notified of the RAC's reserve requirements for the year.

When the Growers' raisin crops are ready for harvesting in late August and early September, *see* Raisin Production Manual at 39 (describing harvest of Thompson Seedless grapes), the Growers undertake significant additional efforts to collect and dry the raisins before sending them to handlers for

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[5] *See also, e.g.*, University of California at Davis Cooperative Extension, Sample Costs to Produce Grapes for Raisins (2006), at 16 (estimating costs at between $3,338 and $3,668 per acre), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCgQFjAB&url=http%3A%2F%2Fcoststudies.ucdavis.edu%2Ffiles%2Fgrraisctoldeqsjv06.pdf&ei=2q4yVKr9CNHlsAS-6oD4Dw&usg=AFQjCNEID0bMGruMQfQ9pXm0FHYHxxFUBQ&sig2=XN7jzTx20A3Pl9R_0Ozlrg&bvm=bv.76802529,d.cWc.

packing. Although new harvesting methods may be emerging, "[t]he traditional method of hand-harvesting and drying grapes on trays for natural raisins has changed little over the past hundred years." *See* Peacock & Swanson, *The Future of California Raisins Is Drying on the Vine*, Cal. Agric., Vol. 59, No. 2, at 70. "This process is labor intensive, requires close supervision and experienced management, and involves weather risks." *Id.* Indeed, California raisin harvesting "has traditionally been considered the most labor-intensive activity in North American agriculture." *California: Raisins, Parlier*, Rural Migration News, Vol. 11, No. 2 (Apr. 2005), *available at* https://migration.ucdavis.edu/rmn/more.php?id=976_0_2_0.

Therefore, by the time the RAC publishes the final "reserve tonnage" requirement in February, *see* 7 C.F.R. § 989.54(d), the Growers have already dedicated considerable amounts of time, money, and effort to the production of their raisin crops. Moreover, they have brought their experience to bear in careful crop management throughout the production process. Accordingly, the Growers reasonably expect to reap the full rewards of their investment and labor on the market. The "reserve tonnage" requirement decimates those expectations in even its lowest years. In the two years at issue in Petitioners' case, 2002–2003 and 2003–2004, the reserve requirement took 47 percent and 30 percent of the Growers' total crops, respectively. *See* Pet. App. 179a–180a. Thus, the Growers essentially gave one out of every two of the raisins they cultivated

and harvested to the government one year, and one out of every three raisins the next year. *See also id.* at 180a n.12 (citing 2005 requirement of 17.5 percent).

The Ninth Circuit panel's thoughtless suggestion that the Growers could avoid this blow to their livelihoods simply by growing different crops does not reflect reality. Given the accretive personal and financial resources the Growers have devoted to their raisin crops over the years, abandoning those crops would be a significant sacrifice. Moreover, such a course of action would prove financially prohibitive for most Growers. In contrast to "row" crops such as corn or wheat, raisin vineyards are difficult and costly to uproot and replace. The Growers estimate that it would cost hundreds of thousands of dollars to replace their entire raisin crops with alternative crops, not accounting for the amount of time they would have to wait before the new crops began to yield a return. *See generally* App. A. The panel's "choice" is thus a highly costly one at both ends, and one that implicates deep personal attachments to an inherited way of life. Accordingly, the panel could not reasonably have expected Petitioners or the Growers to relinquish that way of life, even if doing so would enable them to avoid the exceedingly onerous (and weakly justified) regulatory burden imposed by the Raisin Marketing Order.

* * *

As Justice Scalia observed during oral argument in a prior iteration of this case, the choice presented by the Raisin Marketing Order amounts to "your

raisins or your life." Transcript of Oral Argument at 31, *Horne v. U.S. Dep't of Agriculture*, 133 S. Ct. 2053 (2013) (Scalia, J.). In view of the actual conditions the Growers face under the Raisin Marketing Order, the panel's conclusion that Petitioners, and likewise the Growers, voluntarily accept the burdens of that Order simply by "choosing" to grow raisins cannot stand.

II. Contrary To The Ninth Circuit Panel's Decision, The Fifth Amendment Commands That The Growers Receive Just Compensation When The Government Takes Title To Their Raisin Crops.

This Court's review is needed to clarify that the illusory "choice" offered by the Ninth Circuit panel is no choice at all. The Ninth Circuit ultimately concluded that the reserve requirement did not effect a taking because "[a]t bottom" it was just "a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 25a. But "choosing" to exercise one of the most fundamental rights in the bundle guaranteed by the Fifth Amendment—the right of alienation—cannot be conditioned upon surrendering just compensation for that choice.[6] The permanent, physical segregation

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[6] The right of alienation has long occupied a central place among the bundle of property rights the Fifth Amendment protects. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property . . . has been part of the Anglo-American legal system since feudal times."); William

and passage of title of a portion of Petitioners' and the Growers' raisin crop every year constitutes a *per se* taking for which they are constitutionally entitled to just compensation. This Court's precedent supports that conclusion, and other courts have accordingly embraced it. The Ninth Circuit's conclusion that the reserve requirement is no more than a use restriction is accordingly in direct conflict with the precedents of this Court and with those of other circuit courts.

The Ninth Circuit's erroneous "use restriction" holding rests on two bases, neither of which is defensible. First, the panel apparently believed that the Fifth Amendment's protections apply only to real and not personal property, and therefore a taking of personal property was not a taking at all. Second, the panel found no problem with the taking because it reasoned that Petitioners actually benefitted from surrendering their personal property to the government without just compensation. This Court must step in to ensure that the Ninth Circuit's dangerous takings rationales do not become entrenched in that circuit or others.

1. As Petitioners capably explain, the distinction drawn by the Ninth Circuit panel between real and personal property lacks support in the case law, *see* Pet. at 16–20, and the historical

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Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner.").

origins of the Fifth Amendment, *see id.* at 20–22. But the panel's distinction also makes no sense in the context of this case. The Growers unquestionably have title to their raisin crops as personal property under California law. *See* Cal. Rev. & Tax. Code § 6016 ("'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses."); *see also* Cal. Com. Code § 2105(1) (defining "goods"). Pursuant to the Raisin Marketing Order, the Growers must transfer title to the RAC for a percentage of their raisins every year. A transfer of title from the Growers to the federal government unquestionably deprives the Growers of their property. Thus, characterizing the raisins as "personal property" does not make the taking of the raisins any less a taking.

Moreover, the panel's semantics notwithstanding, there is no practical difference between a "reserve tonnage" of the Growers' raisins and a reserve acreage of the Growers' vineyards. If the Raisin Marketing Order specified a number of acres of land—that is, real property—that the Growers were required to cordon off from the acres from which they could sell raisins on the free market, then the Ninth Circuit panel would have been forced to reach the opposite conclusion. In that case, there would be no plausible distinction whatsoever between the Raisin Marketing Order and the taking this Court found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where state law had required a landlord to permit cable installations on his rental

property. Concluding that the cable installations were "a minor but permanent physical occupation of an owner's property," the Court held that they constituted a taking and therefore entitled the landlord to compensation. *See Loretto*, 458 U.S. at 421. No matter how small the reserve requirement, therefore, an order mandating that the Growers physically cordon off part of their acreage for the government's use would constitute no less of a "physical occupation" than the cable installation requirement in *Loretto*.

Equally analogous to the cable installation requirement in *Loretto*, the "reserve tonnage" requirement cuts through every strand in the traditional bundle of property rights—ownership, possession, use, and disposal—that the Growers hold in the reserve raisins. The Growers relinquish their title to, and physical possession of, the reserve raisins to the government, and they lose control over the use and disposal of the raisins from that point on. "[S]uch a physical occupation of property is," quite simply, "a taking." *Loretto*, 458 U.S. at 421. The fact that they may receive some compensation for the reserve raisins, contingent on factors entirely beyond their control, in no way diminishes the taking that has occurred; it only raises the question of whether the offered compensation is just.

2. The Ninth Circuit's conclusion that the Raisin Marketing Order is a valid "use regulation" rather than a "physical occupation" because of some purported benefit to the raisin growers is no more defensible. Pet. App. at 22a (finding that the reserve

raisins' "disposition, while tightly controlled, inures to [Petitioners'] benefit"). This Court has never endorsed the argument that a nebulous "benefit" associated with a taking can substitute for the just compensation required by the Fifth Amendment. Indeed, if that were the case, the scheme specifically proscribed in *Loretto*—the "requisition [of] a certain number of apartments" in a rental building "as permanent government offices," 458 U.S. at 439 n.17—would be permissible provided that the government's occupation constricted the rental market supply and thereby propped up rental prices to the benefit of the landlord. As the Court concluded in *Loretto*, however, "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* Accordingly, even though "*Loretto* specifically preserve[d] the state's 'substantial authority' and 'broad power to impose appropriate restrictions on an owner's use of his property,'" Pet. App. 22a (quoting *Loretto*, 458 U.S. at 441), it did not do so at the expense of the Fifth Amendment.

This Court has made clear that there is no "blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority." *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). The Ninth Circuit panel's attempt to contort the Raisin Marketing Order into a mere "use restriction," or a condition on entry into interstate commerce, *see* Pet. App. at 25a, amounts to an attempt to negate that statement. *See Loretto*, 458 U.S. at 425 ("It is a separate question . . . whether an otherwise valid regulation so frustrates property

rights that compensation must be paid."). It also puts the Ninth Circuit at odds with other circuits, such as the Eleventh Circuit, on this issue. *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999) ("Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property. However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property."). This Court's review is needed to clarify that when the government takes title to, and physical possession of, property—whether real or personal, and regardless of the regulatory justification—a taking has occurred and just compensation must be paid.

III. Absent Review, The Ninth Circuit's Decision May Have Sweeping Ramifications With Debilitating Impacts On Agricultural And Other Small Producers.

Though unique in certain respects, the Raisin Marketing Order bears resemblance to many other agricultural orders with significant impacts in California. Should the Court allow the Ninth Circuit's erroneous Takings Clause analysis to stand, that analysis could infect regulation of other crops upon which the region is heavily—and proudly—dependent. The decision thus holds much greater

significance than its immediate outcome for Petitioners and the Growers.

The Raisin Marketing Order imposes the most "draconian" burden of all the agricultural marketing orders now in effect. *Evans*, 74 Fed. Cl. at 555. Unlike the marketing orders for almonds, walnuts, tart cherries, prunes, and spearmint oil, for example, it "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558 (citing 7 C.F.R. §§ 989.54, 989.65, 989.66(b)(2), (4)); *cf.* 7 C.F.R. § 981.52 (requiring almond handlers to "hold in [*their*] possession or under [*their*] control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation"); *id.* §§ 993.57, 993.54 (imposing similar requirement on prune handlers); *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 788–89 (N.D. Cal. 1975) ("These reserve prunes are not physically segregated from the salable prunes, however, and thus the reserve is, in fact, a paper reserve.").

Nonetheless, the Raisin Marketing Order shares certain features with marketing orders for other agricultural products. *See Evans*, 74 Fed. Cl. at 555. The RAC is one of many industry committees with the power to sell or dispose of reserves held for the government's account. *See* 7 C.F.R. §§ 981.66(a) (almonds); 984.56(a) (walnuts), 993.65(a) (prunes). Additionally, like raisin producers, producers of almonds, walnuts, and prunes receive only a pro rata share of any net proceeds from the sale of their

reserve crops. *See* 7 C.F.R. §§ 981.66(e) (almonds), 984.56(e) (walnuts), 993.65(e) (prunes). The panel's decision affords no basis for distinguishing the marketing orders for other crops from the Raisin Marketing Order for purposes of its Takings Clause analysis. Therefore, it would require little effort for the Department of Agriculture to ratchet up the marketing restrictions for other crops to the most "draconian" level, *Evans*, 74 Fed. Cl. at 555, and take title to and physical possession of these other crops' reserves as well.

All of those crops, moreover, grow mostly in California, under the Ninth Circuit's jurisdiction.[7] Thus, the Ninth Circuit's decision sets up the anomalous situation in which the Fifth Amendment protections recognized in other jurisdictions, such as the Eleventh Circuit, would be available to Florida orange growers, but of no avail to California orange growers. Equally without protection would be other industries located within the bounds of the Ninth

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[7] *See* Agricultural Marketing Resource Center, *Almond Profile*, http://www.agmrc.org/commodities__products/nuts/almond-profile/ (last visited Oct. 6, 2014) ("California is the only state that produces almonds commercially."); Agricultural Marketing Resource Center, *English Walnuts Profile*, http://www.agmrc.org/commodities__products/nuts/english-walnuts-profile/ (last visited Oct. 6, 2014) ("California produces 99 percent of the nation's commercial English walnuts."); Agricultural Marketing Resource Center, *Prunes Profile*, http://www.agmrc.org/commodities__products/fruits/prunes-profile/ (last visited Oct. 6, 2014) ("Today, California produces 99 percent of U.S. prunes.").

Circuit. As Petitioners noted below, the panel's reasoning would allow the government to "require a manufacturer of microchips to turn over 50 percent of its manufactured goods for government use, if the manufacturer sells those chips in interstate commerce." Petition for Panel Rehearing or Rehearing En Banc at 21, *Horne v. U.S. Dep't of Agric.*, No. 10-15270 (9th Cir. Sept. 8, 2011). Meanwhile, industries in Florida and other states under the Eleventh Circuit's jurisdiction will retain the full protection of the Fifth Amendment. *See* Pet. at 31–32 (discussing circuit split); *Gulf Power Co.*, 187 F.3d at 1331. The Court's clarification of the scope of that protection is sorely needed to remedy this disparity and prevent further uncompensated takings within the Ninth Circuit.

CONCLUSION

As one of the Growers expresses, the Growers simply want independence and a "chance to live the American dream" free of the burdens imposed by the Raisin Marketing Order. App. A at 9a. For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

INDEPENDENT RAISIN GROWERS

1. Walter A. Shubin operates a raisin vineyard under the name Shubin Farms. He farms 20 acres of raisins and has been producing raisins for 64 years. His family has been in the raisin growing business for 78 years. From the time Mr. Shubin completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,500 to $3,000 per acre on cultural costs.[1] As a result of the Raisin Marketing Order, Mr. Shubin has lost approximately 180 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Shubin to obtain bank loans to finance his next crop season. Mr. Shubin and his wife have secured second jobs in order to keep their land and their home.

2. Harris Daggs farms 79 acres of raisins and has been producing raisins for 18 years. His family has been in the raisin growing business for 40 years. Mr. Daggs estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $175,000. As a result of the Raisin Marketing Order, Mr. Daggs has been forced to take a full-time job to support the farm.

3. Chris C. Gauss operates a raisin vineyard under the name Gauss Ranches. He farms 40 acres of raisins and has been producing raisins for 39

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[1] "Cultural costs" include the costs of pruning, fertilizing, and irrigating the crop, as well as the costs of weed, insect, and disease control.

years. His family has been in the raisin growing business for 90 years. From the time Mr. Gauss completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Gauss estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000. The possibility of a reserve requirement also makes it difficult for Mr. Gauss to obtain bank loans to finance his next crop season.

4. John Radovich operates a raisin vineyard under the name Radovich Farms. He farms 18 acres of raisins and has been producing raisins for 26 years. His family has been in the raisin growing business for over 50 years. From the time Mr. Radovich completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,000 per acre on cultural costs. Mr. Radovich estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $20,000, noting that he would have to wait until the new crop produces. The possibility of a reserve requirement also makes it difficult for Mr. Radovich to obtain bank loans to finance his next crop season. For many years under the Raisin Marketing Order, Mr. Radovich did not receive any payment for his reserve raisins, making it difficult to cultivate the following year's crop.

5. Jack Blehm farms 60 acres of raisin vineyard and has been producing raisins since 1972. His family has been in the raisin growing business since 1942. From the time Mr. Blehm completes one year's

raisin harvest to the time the next harvest begins, he spends approximately $3,000 to $3,800 per acre on cultural costs. Mr. Blehm conservatively estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $20,000 per acre. Mr. Blehm works a second job to help pay the bills and compensate for the loss of income resulting from the Raisin Marketing Order.

6. Roger Blehm farms 60 acres of raisin vineyard and has been producing raisins for 8 years. His family has been in the raisin growing business for 71 years. From the time Mr. Blehm completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,800 to $4,000 per acre on cultural costs. Mr. Blehm estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000 per acre. Mr. Blehm works a second job to help compensate for the loss of income resulting from the Raisin Marketing Order.

7. Arleen G. Daggs farms 70 acres of raisin vineyard. Her family has been in the raisin growing business since 1917. From the time Ms. Daggs completes one year's raisin harvest to the time the next harvest begins, she spends approximately $2,500 per acre on cultural costs. Ms. Daggs estimates the cost of removing her raisin vineyard acreage and planting another crop amenable to his soils would be a minimum of $25,000 per acre, not including the loss of income for three years. Ms. Daggs works a second job to help pay some of the expenses associated with the culture and harvest of

the crops. She notes that "since 1964" she has always had to have a second job, whereas "[b]efore that the farm raised the family." Without a very large farming operation and significant diversification, she concludes, raisin farming has become only a hobby.

8. Earl O. Boyajian farms 98 acres of raisin vineyard and has been producing raisins for 67 years. His family has been in the raisin growing business for 94 years. From the time Mr. Boyajian completes one year's raisin harvest to the time the next harvest begins, he spends more than $1,000 per acre on cultural costs. Mr. Boyajian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be significant. As a result of the Raisin Marketing Order, Mr. Boyajian has lost approximately 130 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Boyajian to obtain bank loans to finance his next crop season. Mr. Boyajian notes that, under the Raisin Marketing Order, he "can never plan a future to improve [his] quality of life" — "[n]o truck, no equipment, no household improvements." He asks that the RAC "at least give" the growers "[their] cultural costs back."

9. Nick Goosev farms 33 acres of raisin vineyard and has been producing raisins for 31 years. His family has been in the raisin growing business for 65 years. From the time Mr. Goosev completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,200

per acre on cultural costs. Mr. Goosev estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $30,000 to $40,000. As a result of the Raisin Marketing Order, Mr. Goosev has lost approximately 15 raisin acres in the last twenty plus years. Under the Raisin Marketing Order, Mr. Goosev can "barely make it every year."

10. Bryan Arabian operates a raisin vineyard under the name Arabian Farms. He farms 170 acres of raisins and has been producing raisins since 1949 as a fourth-generation raisin grower. From the time Mr. Arabian completes one year's raisin harvest to the time the next harvest begins, he spends approximately $4,000 per acre on cultural costs. Mr. Arabian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000 per acre. The Raisin Marketing Order "creates a complex system and the banks don't like to work w[ith]" them.

11. David Baer farms 20 acres of raisin vineyard and has been producing raisins for over 30 years as a third-generation raisin grower. From the time Mr. Baer completes one year's raisin harvest to the time the next harvest begins, he spends significant resources on cultural costs. The possibility of a reserve requirement makes it difficult for Mr. Baer to obtain bank loans to finance his next crop season. The Raisin Marketing Order also makes it "difficult to make ends meet."

12. Harjinder S. Gill farms 160 acres of raisin vineyard and has been producing raisins for 36 years

as a first-generation immigrant. From the time Mr. Gill completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Gill estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre. As a result of the Raisin Marketing Order, Mr. Gill has lost 20 raisin acres in the last twenty plus years. He has not been turned down for a bank loan because his operation is diversified, but he notes that he "do[es] not even get [his] cost of production back" for the reserve raisins.

13. Brad Hansen operates a raisin vineyard under the name Brad Hansen Farm. He farms 240 acres of raisins and has been producing raisins for 34 years as a fourth-generation farmer. From the time Mr. Hansen completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Hansen estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre, and he notes that he would replace the raisin crop with almonds. As a result of the Raisin Marketing Order, Mr. Shubin has lost approximately 40 raisin acres in the last twenty plus years. The reserve requirement "drastically lowers [his] farm/family income."

14. Loren T. Linscheid (Tom) operates a raisin vineyard under the name Linscheid Organic Farm. He farms 40 acres of raisins and has been producing raisins for 20 years. His family has been in the raisin growing business for 60 years. From the time

Mr. Linscheid completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Linscheid estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. As a result of the Raisin Marketing Order, Mr. Linscheid has lost approximately 40 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Linscheid to obtain bank loans to finance his next crop season. He believes that "no one would go into [the] raisin business today with th[ese] . . cultural costs and [this] economic climate."

15. Wayne Snell farms 27 acres of raisins and has been producing raisins for 43 years. From the time Mr. Snell completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,800 per acre on cultural costs. Mr. Snell estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $45,000. As a result of the Raisin Marketing Order, Mr. Snell has lost 29.5 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Snell to obtain bank loans to finance his next crop season.

16. Tom Pavich and Frances Pavich operate a raisin vineyard under the name FMP Vineyards. They farm 80 acres of raisins and have been producing raisins for 25 years. They are second-generation raisin growers, and their family has been

in the business for 61 years. From the time the Paviches complete one year's raisin harvest to the time the next harvest begins, they spend approximately $2,500 per acre on cultural costs. The Paviches estimate the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $800,000. As a result of the Raisin Marketing Order, the Paviches have lost hundreds of raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for the Paviches to obtain bank loans to finance their next crop season, and they have been turned down for loans in the past. In an effort to sell all of the organic raisins they grow, the Paviches have been "forced to buy conventional raisins to substitute for [their] organic raisins on years there was a reserve."

17. David Hernandez operates a raisin vineyard under the name Mi Tierra Vineyard. He farms 20 acres of raisins and has been producing raisins for 12 years. From the time Mr. Hernandez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,000 per acre on cultural costs. Mr. Hernandez estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000. The possibility of a reserve requirement makes it difficult for Mr. Hernandez to obtain bank loans to finance his next crop season.

18. Robert Z. Gonzalez operates a raisin vineyard under the name Gonzalez Farms. He farms 50 acres of raisins and has been producing raisins

since 1966. From the time Mr. Gonzalez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Gonzalez estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $850,000 just for 20 acres. As a result of the Raisin Marketing Order, Mr. Gonzalez has lost 20 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Gonzalez to obtain bank loans to finance his next crop season. Mr. Gonzalez expresses his desire simply for independence and "a chance to live the American dream."